

STATE OF MICHIGAN
IN THE SUPREME COURT

OSHTEMO CHARTER TOWNSHIP,
Appellant,

Supreme Court No. 150695

v

Court of Appeals No. 317893

MICHIGAN PUBLIC SERVICE COMMISSION
and MICHIGAN ELECTRIC TRANSMISSION
COMPANY,
Appellees.

MPSC Case No. U-17041

_____ /

**MICHIGAN PUBLIC SERVICE COMMISSION'S BRIEF IN OPPOSITION
TO OSHTEMO CHARTER TOWNSHIP'S
APPLICATION FOR LEAVE TO APPEAL**

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Article 7, §29 of the Michigan constitution grants municipalities the right to withhold consent to conduct utility business within its borders, and to reasonable control over its streets and public places. Article 7, §22 provides that municipalities may enact ordinances subject to law. Townships enact zoning ordinances pursuant to the Zoning Enabling Act, which provides that all zoning ordinances are subject to the Electric Transmission Line Certification Act. Does the Court of Appeals' determination that a certificate issued pursuant to the Certification Act takes precedence over a conflicting zoning ordinance comport with Michigan's constitution?

Appellants' answer: No.

Appellee METC's answer: Yes.

Michigan Public Service Commission's answer: Yes.

Michigan Court of Appeals' answer: Yes.

2. A state law takes precedence over a local ordinance when the state law so expressly provides and there is a conflict. The Certification Act expressly provides that a Certificate takes precedent over a conflicting ordinance. Was the Commission's determination that the Certificate requiring aboveground construction took precedence over the Ordinance requiring underground construction lawful and reasonable?

Appellants' answer: No.

Appellee METC's answer: Yes.

Michigan Public Service Commission's answer: Yes.

Michigan Court of Appeals' answer: Yes.

3. The Legislature does not improperly delegate power to an administrative agency when it sets sufficient standards for the agency's exercise of that authority. The Certification Act restricts the Commission's authority by providing it must grant a certificate if an application meets specific criteria. Was the Legislature's delegation of authority to the Commission proper?

Appellants' answer: No.

Appellee METC's answer: Yes.

Michigan Public Service Commission's answer: Yes.

Michigan Court of Appeals' answer: Yes.

4. Generally, the Court of Appeals in construing a statute must apply the definitions set out in the statute. The Appellant did not argue below that any definition sections applied. Was the Court of Appeals' failure to consider definition sections not raised by the Appellant proper, especially where the definitions cited by the Township are either inapplicable or would not change the outcome?

Appellant's answer: No.

Appellee METC's answer: Yes.

Michigan Public Service Commission's answer: Yes.

The Court of Appeals did not address this question.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED**Const 1963, art 7, § 22**

Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.

Const 1963, art 7, § 29

No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

Electric Transmission Line Certification Act (Act 30 or Certification Act),**MCL 460.561 *et seq*:****MCL 460.568(4)-(6):**

(4) The commission shall grant or deny the application for a certificate not later than 1 year after the application's filing date. If a party submits an alternative route for the proposed major transmission line, the commission shall grant the application for either the electric utility's, affiliated transmission company's, or independent transmission company's proposed route or 1 alternative route or shall deny the application. The commission may condition its approval upon the applicant taking additional action to assure the public convenience, health, and safety and reliability of the proposed major transmission line.

(5) The commission shall grant the application and issue a certificate if it determines all of the following:

- (a) The quantifiable and nonquantifiable public benefits of the proposed major transmission line justify its construction.
- (b) The proposed or alternative route is feasible and reasonable.
- (c) The proposed major transmission line does not present an unreasonable threat to public health or safety.
- (d) The applicant has accepted the conditions contained in a conditional grant.

(6) A certificate issued under this section shall identify the major transmission line's route and shall contain an estimated cost for the transmission line.

MCL 460.570(1):

(1) If the commission grants a certificate under this act, that certificate shall take precedence over a conflicting local ordinance, law, rule, regulation, policy, or practice that prohibits or regulates the location or construction of a transmission line for which the commission has issued a certificate.

**COUNTER-STATEMENT OF JUDGMENT /
ORDER APPEALED FROM AND RELIEF SOUGHT**

On November 18, 2014, the Michigan Court of Appeals issued a per curiam opinion in consolidated Docket Nos. 317872 and 317893. Subsequently, the Court of Appeals published the decision on January 13, 2015. *Har Co, LLC v Michigan Elec Transmission Co*, __ Mich App __; __ NW2d __ (2014). As reporter pages are not yet available, citations herein are to the slip opinion, and a copy is attached as Appendix A. Appellants in Docket No. 317872 did not seek leave to appeal. Appellant Charter Township of Oshtemo (“Oshtemo Township” or the “Township”) appeals from the Court of Appeals’ opinion in Docket No. 317893 affirming the decision of the Michigan Public Service Commission (“MPSC” or “Commission”) to grant a certificate of public convenience and necessity (“Certificate” or “CPCN”) to Michigan Electric Transmission Company (“METC”) for construction of an overhead transmission line.

REASONS FOR DENYING THE APPLICATION

This case is about the reliability of our electric transmission system. We all know, first hand, how devastating transmission system failures can be. In August of 2003, overloaded transmission lines hit unpruned foliage in Ohio causing a local blackout that cascaded into widespread distress on the electric grid. The blackout affected an estimated 50 million people in Michigan, seven other states, and Ontario and shut down 508 generating units at 264 power plants. The economic costs of the blackout were massive, costing the United States between \$4 billion and \$10 billion.¹ It is because the impact of transmission failures on our interconnected grid is so catastrophic that federal reliability standards for transmission systems exist, why they are enforceable, and why fines for violation are up to \$1 million per day.

When transmission companies identify a reliability problem on their systems, it is imperative that they be able to solve the problem. This means transmission companies must be able to build new transmission infrastructure. The problem is that transmission infrastructure is not pretty. Nobody wants high-tension transmission lines in their backyard. Local municipalities enact ordinances to protect their towns blocking construction of transmission lines. Local landowners fight condemnation of their property in the local circuit courts. A patchwork of local ordinances preventing infrastructure and piecemeal judicial decisions regarding the

¹U.S.-Canada Power System Outage Task Force *Final Report on the August 14, 2003 Blackout in the United States and Canada: Causes and Recommendations*, <http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/BalckoutFinal-Web.pdf> retrieved February 13, 2014, pp 1, 45-68, 74.

public necessity of particular transmission projects caused a major problem in Michigan. No one was building new transmission infrastructure, and our existing transmission system was aging. The Michigan Legislature recognized this growing problem and passed the Electric Transmission Line Certification Act. The Certification Act took the public necessity question out of the hands of local judges and put it into the hands of the Michigan Public Service Commission (MPSC) – an entity that could weigh competing interests with the best interests of Michigan as a whole in mind. The Act also prevents local municipalities from blocking construction of transmission infrastructure in their jurisdictions.

This case presents a perfect example of why the Legislature passed the Certification Act. The Michigan Electric Transmission Company identified a system reliability problem that it must solve to maintain compliance with federal reliability standards. The solution required a new transmission line. METC opened a dialogue with local landowners and with Oshtemo Township in an effort to work out easements and resolve local concerns about the new transmission line. In response, Oshtemo Township amended its local zoning ordinance to block construction of the line. Oshtemo Township's actions forced METC to file an application with the Commission under the Certification Act. The Township challenged the justification for the Line as well as its proposed route. All parties submitted evidence, and ultimately, the Commission found METC's and the Commission Staff's expert witnesses most credible and granted the certificate. The Court of Appeals affirmed that grant. Now the Township mistakenly argues that

the Certificate should not take precedence over its local ordinance, and that the Court of Appeals erred in finding there was a conflict between the Certificate, which requires aboveground construction, and the Township's ordinance, which requires underground construction.

Consideration of the factors set forth by the Court in Michigan Court Rule 7.302(B) favors denial of the Application, especially where the Township devoted none of its argument to establishing the factors:

- The issue does not involve a substantial question as to the validity of a legislative act because the Township's argument that the Certification Act impermissibly delegates legislative authority to the Commission is plainly without merit and therefore is not substantial.
- Though the case is against a state agency, and the issue may have significant public interest because it involves the powers of municipalities and several amicus briefs were filed in the Court of Appeals, the agency merely applied Michigan law as written, which the Court of Appeals has affirmed in a published opinion that will resolve other similar issues, and is consistent with this state's jurisprudence.
- Though the case may involve legal principles of major significance to the State's jurisprudence, the Township's arguments stray widely from accepted legal principles and show a basic misunderstanding of legal concepts.
- The decision is neither clearly erroneous nor will it cause material injustice, nor does it conflict with any other decisions of either the Supreme Court or Court of Appeals.

This case raises no new or novel issues for consideration. Rather, the Township rails against published precedent, misunderstands the concepts at issue, and raises red herring issues that were never before the Court of Appeals. The Township's Application made absolutely no attempt to show any of the grounds

enumerated in MCR 7.302(B), and it does not merit the time and attention of this Court.

COUNTER-STATEMENT OF FACTS

I. The Michigan Legislature enacted the Electric Transmission Line Certification Act to prevent municipalities from interfering with construction and placement of Michigan's critical transmission infrastructure.

In order to understand the facts of this case, it is important have a basic understanding of the purpose of the Certification Act. In 1995, Michigan was one of only seven states without a transmission line certificate of need process. "Electric Transmission Line Siting Process," State Senator Mat J. Dunaskiss (April 4, 1995) (Attachment 1). "Michigan's demand for electricity is increasing but opposition to constructing transmission infrastructure has stymied the utilities[] ability to meet the ever increasing demand of the consumer. Ultimately, this opposition inhibits economic growth." *Id.* This opposition to infrastructure is often referred to as the "not in my backyard" phenomenon. In fact, in 1995, there were no major electric transmission lines under construction in Michigan. *Id.*

State Senator Dunaskiss sponsored Senate Bill 409, which became PA 30 of 1995, the Certification Act, to fix the "not in my backyard" problem. He explained that "[d]eveloping a rational energy policy that assures adequate availability statewide is properly a state's responsibility." *Id.* He noted, "[u]nder the current system, developments to meet public energy needs are constructed much like a patchwork quilt across the state without a uniform process." *Id.* "This exposes multi-county projects, designed primarily for the economic benefit of the state, to the construction and siting whims and uncertainties of each local jurisdiction traversed by the planned transmission line." Senate Majority Policy Office,

Memorandum to the Technology and Energy Committee, Electric Line Certification, Tom Atkins, SB 409-414, March 22, 1995 at 1. Not only would the Certification Act bring all major transmission line construction under the control of the MPSC, “[b]y providing that a PSC-issued certificate would preempt local ordinances and would be binding upon the court in a condemnation action, the bills would eliminate the current patchwork of local regulation and judicial decision-making.” Senate Fiscal Agency, Bill Analysis, K. Lundquist, SB 408-414, March 28, 1995, at 5.

In 1995, the Legislature enacted MCL 460.561 *et seq* to (1) “regulate the location and construction of certain electric transmission lines”; (2) “to prescribe powers and duties of the Michigan public service commission and to give precedence to its determinations in certain circumstances”; and (3) “to prescribe the powers and duties of local units of government and officials of those local units of government.” Title, 1995 PA 30.² The Legislature recognized how vital a reliable transmission system is to our state when it enacted MCL 460.563: “(1) Transmission of electricity is an essential service. (2) This act shall control in any conflict between this act and any other law of this state.”

The Certification Act created the process by which the MPSC decides whether the quantifiable and nonquantifiable public benefits of a proposed transmission line justify its construction, decides whether the proposed route is

² “Although an act's title is not to be considered authority for construing an act, it is useful for interpreting the purpose and scope of the act.” *Capital Area Dist Library v Michigan Open Carry, Inc*, 298 Mich App 220, 230; 826 NW2d 736, (2012) citing *Mich Coalition for Responsible Gun Owners v City of Ferndale*, 256 Mich App 401, 409 n. 6; 662 NW2d 864 (2003).

reasonable and feasible, and determines whether the proposed transmission line presents an unreasonable threat to public health or safety. MCL 460.568(5)(a)-(c). The Certification Act mandates Commission approval for major transmission lines. MCL 460.565. A major transmission line is one that is five miles or more in length “through which electricity is transferred at system bulk supply voltage of 345 kilovolts (kV) or more.” MCL 460.562(g), MCL 460.567(1). While a Certificate is not mandatory for smaller transmission lines, the Certification Act does contain a voluntary process for Commission approval of these non-major transmission lines. MCL 460.569.

Often times a utility can reach easement agreements with affected landowners and municipalities when constructing non-major transmission lines. When these negotiations fail, however, the Certification Act provides a process where the utility can apply for a Certificate from the Commission for the new transmission line. The Certificate takes “precedence over a conflicting local ordinance, law, rule, regulation, policy, or practice.” MCL 460.570(1). Furthermore, the Certificate is “conclusive and binding as to the public convenience and necessity for that transmission line and its compatibility with the public health and safety or any zoning or land use requirements” in a subsequent eminent domain proceeding. MCL 460.570(3). Voluntarily applying for a certificate of need for a non-major line confers benefits (avoiding local opposition to transmission infrastructure and avoidance of public necessity determinations in future condemnation proceedings); but it also has significant drawbacks for a transmission company. Once a

transmission company has applied for a certificate, the Certification Act prohibits any construction of the proposed line until the MPSC has issued a certificate of necessity. “If a . . . transmission company applies for a certificate under this section, the . . . transmission company shall not begin construction of the proposed transmission line until the commission issues a certificate for that transmission line.” MCL 460.569(1).

The Certification Act requires that the applicant include the following data in its application in support of its request for a certificate of public convenience and necessity (among several other requirements):

If a zoning ordinance prohibits or regulates the location or development of any portion of a proposed route, a description of the location and manner in which that zoning ordinance prohibits or regulates the location or construction of the proposed route. [MCL 460.567(2)(d).]

Upon receipt of an application for a certificate of public convenience and necessity, the Commission must commence a contested case proceeding. MCL 460.568(2). Any affected party, specifically including municipalities and landowners, may intervene as of right. *Id.* The Certification Act provides that the Commission must grant an application for a certificate if it determines all of the following:

- (a) The quantifiable and nonquantifiable public benefits of the proposed major transmission line justify its construction.
- (b) The proposed or alternative route is feasible and reasonable.
- (c) The proposed major transmission line does not present an unreasonable threat to public health or safety.

- (d) The applicant has accepted the conditions contained in a conditional grant. [MCL 460.568(5).]

Thus, the legislature limited the authority the Commission has in approving transmission line certificates of necessity to a very constricted set of criteria. In addition, “[t]he Commission may condition its approval upon the applicant taking additional action to assure the public convenience, health, and safety and reliability of the proposed transmission line.” MCL 460.568(4). The certificate must also “identify the major transmission line’s route and shall contain an estimated cost for the transmission line.” MCL 460.568(6). The Commission has one year after an applicant’s filing date to grant or deny the application for a certificate.

MCL 460.568(4).

II. METC discovered it had a system reliability problem and MISO approved the Proposed Transmission Line as the most effective long-term solution.

During a routine planning session in 2007, METC determined that it has a reliability risk in the Kalamazoo area (3 TR 80). METC found that if one of the three 345/138 kilovolt (kV) transformers at its Argenta Station is taken out of service, and another transformer fails, the remaining load “would be projected to overload the remaining transformer at system load levels at or below (and above) 85% of the peak system load level.” (3 Tr. 79.) The three transformers at the Argenta Station provide power to the entire Kalamazoo and Battle Creek areas.

This situation does not meet the North American Electric Reliability Corporation's³ ("NERC") reliability standards. (3 TR 86.)

In response to this reliability problem, METC identified several options to resolve it, and submitted them to the Midcontinent Independent Transmission System Operator, Inc. ("MISO") for evaluation in the 2009 MISO Transmission Expansion Plan ("MTEP"). (3 TR 80-82, 84.) MISO is the NERC Planning Authority (i.e. the federally endorsed entity) responsible for reliable transmission in parts of Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Montana, North Dakota, South Dakota, Wisconsin, and Manitoba. (3 TR 86.) Among the options presented to MISO was the transmission line at issue in this case (the "Proposed Transmission Line" or "Line"). (*Id.*)

MISO first considered the Proposed Transmission Line in 2008 while "considering other feasible transmission alternatives" in a search for "the most effective long term solution" to the identified transmission reliability problem. (3 TR 87.) MISO, its stakeholders, and MSPC Staff considered the various options several times, including during meetings held on May 14, 2008, December 16, 2008, and July 17, 2009. (3 Tr. 86-87, 357.) Ultimately, MISO's Board of Directors approved the Proposed Transmission Line as the best alternative in December 2009. (3 TR 88.)

³ NERC promulgates and enforces mandatory federal transmission reliability standards. NERC may fine transmission companies up to \$1 million per day per violation. 16 USC 824o.

III. Following MISO approval, METC began planning the route and negotiating with local communities.

METC contracted with a private firm, Burns & McDonnell to perform a route selection study for the Proposed Transmission Line. (METC Exhibit A-11 at 5.) Both METC and its contractor began making contact with local officials about the project in late 2010. (*Id.* at 10.) In December of 2010, METC and its contractor met with officials from Oshtemo to discuss the line and its route. (3 TR 161-2.) In early 2011, METC met with Oshtemo Township’s supervisor, attorney, planner, clerk and treasurer to discuss the Line. (*Id.*) Throughout 2011, METC continued to meet with Oshtemo officials, landowners, and homeowners associations. (3 TR 162-164.)

IV. Oshtemo Township amended its “Utility Control” ordinance specifically to block construction of the Proposed Transmission Line.

Shortly following a meeting between METC and landowners in late 2011, Oshtemo amended its “Utility Control” ordinance. Township witness Elizabeth Heiny-Cogswell testified that Oshtemo amended its ordinance in response, when it thought that the Proposed Transmission Line would be built without there being a public hearing. (3 TR 293-295.) Oshtemo’s concerns were not unfounded. There is no requirement that a utility seeking to build a non-major transmission line hold a public hearing. Nor is there any requirement of MPSC approval prior to a transmission company seeking to condemn property it needs to construct a new non-major transmission line. The Electric and Gas Corporations Act, MCL 486.251, *et seq.* provides that “an independent transmission company shall have the power to condemn property that is necessary to transmit electricity for public use” MCL

486.252. Moreover, while this power is subject to both the Certification Act and the Uniform Condemnation Procedures Act, the Certification Act does not require a certificate for non-major transmission lines.

Therefore, in order to prevent, or at least control, the Proposed Transmission Line's construction, Oshtemo adopted Ordinance No. 525 that amended Ordinance No. 114 to prohibit utilities from constructing lines without first securing the approval of the township board, submitting construction plans and environmental studies, and making a showing of necessity to the township prior to approval. (3 TR 117-119; METC Exhibit A-9.) According to the newly amended ordinance, METC would also have to bury portions of the line underground. (*Id.*)

The Township's newly amended ordinance provides, in pertinent part:

- (a) No public or private utility shall hereafter install, construct, relocate or replace any line, pole, main, tower, building, structure or appurtenance thereto within the public streets, roads, alleys or right-of-ways within the Township **without first securing the approval and consent to the same by the Township Board or its duly authorized representative . . .**
- (b) Any public or private utility seeking such approval and consent shall submit plans showing the location of the proposed installation, construction or facility; the height, depth and size thereof; and its proximity to existing improvements and other utility facilities within the Township, as well as the public streets, roads, alleys or rights-of-way. The plans shall be accompanied by the documents required in subsection (c) below. Commencing November 25, 2011, all public or private utilities who seek to construct utility lines, wires and related equipment and facilities along, across, over, and/or adjacent to any public street in the Township **shall be required to place all lines, wires and/or related facilities and equipment underground** within the public road right-of-way and to a point within 250 feet either side of said public right-of-way . . .

- (c) The Township Board or its duly authorized representative shall not unreasonably withhold such approval and consent where the proposed facilities are **shown to be necessary for the servicing of customers and for the protection or promotion of the health, safety and general welfare of the community**. A utility must provide a detailed description of the project, its location and an explanation of why the location was chosen for the proposed utility lines, wires or related equipment, as well as a description of any alternate locations considered and why they were not selected; an analysis of the Township Zoning Ordinance and whether any portion of the utility lines, wires or related equipment are located in a zoning district with additional compliance requirements; all information supporting the underlying need of the project; an environmental study of the area affected; information addressing potential effects on public health and safety, as well as any other information requested by the Township. **The Township shall have the right and authority to determine the location of the same within the public right-of-way, street, road, alley or public place including verification that the same complies with the Township zoning requirements and the obligation and responsibility, if any, incident to such location and installation imposed upon such utility...** the Township may choose to hold a public hearing on the request, depending upon the impact on the community. If a public hearing is held, the utility will be required to attend and present its plan and specifications as required under this Ordinance to the Township Board in a public format, subject to questioning by the Board and its experts. [3 TR 117-119 (emphasis in original); METC Exhibit A-9.]

Therefore, to comply with the new ordinance, METC would have to submit plans and studies to the Township for approval, would have to bury portions of the line underground, and would have to make a showing of necessity for the line, among other requirements. (*Id.*) And, the Township would have the authority to “determine the location” of the proposed transmission line. (*Id.*)

V. METC determined compliance with Oshtemo's new ordinance would be too costly, so it began preparing to file an application for a Certificate, in hopes of avoiding the ordinance.

METC determined that the cost of "constructing the line underground would be approximately 5-7 times more per mile." (METC Exhibit A-24.) Building underground is more expensive than stringing overhead wires because it requires "(1) more complex and expensive underground cables (compared to bare overhead wires); (2) significant excavation and civil engineering work; and, (3) increased labor costs due to installation of the cables, duct banks, and terminations." (METC Exhibit A-40.) In addition, on an ongoing basis, it is much more expensive to maintain underground lines as maintenance costs for underground lines "are much higher than the maintenance costs for overhead lines." (*Id.*) Apparently because of the increased cost of building underground and complying with the township application process, METC decided to seek a certificate of need from the Commission.

During the summer of 2011, METC's contractor conducted a new route selection study. (3 TR 113; METC Exhibit A-11.) The following summer, METC offered in writing to meet with Oshtemo's supervisor. (METC Exhibit A-13.) METC attended an Oshtemo Township meeting and advised them of the proposed and alternate routes, discussed the Certification Act process, and advised them that METC would hold a public meeting. (3 TR 163; METC Exhibit A-14.) In June of 2012, METC held a public open house followed by a public meeting in Oshtemo Township where several individuals commented. (3 TR 164; METC Exhibit A-18.)

Staff witness Lynn M. Beck testified that METC met all requirements for meeting with the public and municipal officials as set forth in MCL 460.566. (3 TR 324.)

PROCEEDINGS BELOW

I. METC filed its application for a Certificate, and the MPSC conducted a contested case.

On July 31, 2012 and pursuant to Public Act 30 (MCL 460.565), METC filed its Application with the Commission for a certificate of public convenience and necessity (“Certificate” or “CPCN”). METC intends to construct a transmission line, “other than a major transmission line,” which consists of “two overhead double-circuit 138 kV lines with a 220-foot right-of-way running through Oshtemo Township, Kalamazoo County, and an electrical transmission substation in Almena Township, Van Buren County, Michigan.” (07/31/12 Application, p 4.)

METC sought a Certificate under Section 9 of Act 30, which authorizes an independent transmission company to file an application for a Certificate for a proposed transmission line other than a major transmission line. MCL 460.569.

Along with its application, METC prefiled direct testimony and exhibits of Carlo P. Capra, Jason Sutton, Stephen G. Thornhill, Gary R. Kirsh, Steven J. Koster, J. Michael Silva, Dr. Mark A. Israel, and Dr. Dwight Mercer. (7/31/12 Application.) The Certification Act requires applicants to include certain data in its application. MCL 460.567(2)(a)-(l). The direct testimony and exhibits prefiled by METC satisfied this basic requirement.

The Commission issued its notice of hearing, scheduling a prehearing conference. (8/20/12 Notice of Hearing.) METC served the notice of hearing on all affected municipalities and landowners as required by the Commission. (9/6/12 Proof of Service.)

At the prehearing conference, the Administrative Law Judge (ALJ) took up motions for intervention. He granted the interventions of Oshtemo Charter Township⁴. (1 TR 14-16.) The parties conducted discovery, submitted testimony, offered their witnesses for cross-examination, and all parties waived cross-examination of expert witnesses at the evidentiary hearing. The ALJ bound the pre-filed testimony and exhibits of METC, the Landowners, Oshtemo Township, and Staff into the record. The ALJ closed the record, which consists of 365 pages of transcript and 137 exhibits.

II. METC and Staff supported METC's application, the Landowners and the Township opposed it.

The parties submitted briefs and reply briefs to the ALJ. Both METC and Staff argued that the Commission should grant a Certificate for the Proposed Transmission Line. Oshtemo Township opposed the grant of a Certificate. Unsurprisingly, Oshtemo Township took the “not in my back yard” position, which focused on opposition to the location of the Line. The Township suggested alternate routes would be preferable or less costly. The Township argued that if the Commission did approve the Line, that it should condition the Certificate on compliance with the Township's zoning ordinance. Finally, the Township argued the grant of a Certificate would be unconstitutional (although the Township did not brief the issue on appeal to the Court of Appeals).

⁴ There were additional intervening parties not involved in this application.

III. The Commission granted METC's application for a Certificate.

The ALJ issued her Proposal for Decision (PFD), finding that the proposed route was reasonable and feasible, and that the Line did not pose an unreasonable threat to health or safety. The ALJ also recommended that the MPSC deny METC's application because the ALJ believed the Line's quantifiable and nonquantifiable benefits did not justify its construction. The ALJ also recommended that if the Commission did grant a Certificate, that it be conditioned on METC burying a portion of the line in compliance with Oshtemo Township's zoning ordinance, or reopening the record for additional proofs regarding whether the line should be above or below ground. (4/29/13 PFD at 64.)

METC, Staff, the Landowners, and Oshtemo Township filed exceptions and replies to exceptions to the ALJ's proposed findings in the PFD. On July 29, 2013, the Commission issued its 27-page Order. The Commission granted the application for a Certificate, finding that the quantifiable and nonquantifiable benefits of the Proposed Transmission Line justified its construction and that the route was both reasonable and feasible. (7/29/13 Order at 25.) The Commission rejected objections to the route and other alternatives. The Commission also stated that its grant of the Certificate preempted Oshtemo Township's zoning ordinance and did not require METC to bury the line. Oshtemo Township appealed.⁵

⁵ Several other parties also opposed the Certificate and appealed the Commission's decision to the Court of Appeals. These other parties did not seek leave to appeal from the Court of Appeals' decision.

IV. The Court of Appeals affirmed the Commission's grant of a Certificate, and its precedence over Oshtemo Township's conflicting ordinance.

In its November 18, 2015 per curiam opinion, the Court of Appeals affirmed the Commission's grant of the Certificate, rejecting the Township's (and other appellants') arguments that the Line was not needed, was not reasonable, and was not feasible. The Township does not raise these issues in its Application. The Court of Appeals also addressed the Township's arguments regarding its ordinance. The Court of Appeals explained that the Township's argument "that Act 30 preempted Oshtemo Township's ordinance and is unconstitutional ignores the clear language of constitutional provisions, MCL 460.570(1), and binding precedent." *Har Co, LLC*, __ Mich App at __ (Slip op at 10). The Court of Appeals found the Commission was entitled to find that METC did not have to comply with the undergrounding ordinance, though this finding was not mandatory. *Id.* at 11. The Commission was entitled to accept record evidence that undergrounding portions of the line would be more costly and thus less favorable than the alternative. *Id.* The Court of Appeals explained that once the PSC issued the Certificate allowing METC to build a line entirely above ground, Oshtemo Township's ordinance conflicted with the Certificate. *Id.* "Under the plain language of MCL 460.570(1), that certificate took precedence over Oshtemo Township's conflicting ordinance that required that a portion of the transmission line be constructed underground." *Id.* The Court of Appeals explained that "[t]he Legislature has the authority to enact laws that limit the way in which a local government can exercise the power granted to it under Const 1963, art 7, § 29." *Id.* citing *City of Lansing v State*, 275 Mich App 423, 433;

737 N.W.2d 818 (2007); see also Const 1963, art 7, § 22. The Court of Appeals rejected Oshtemo Township’s argument that the Commission was required to determine if the ordinance conflicted with “some state law other than the CPCN” stating that argument “finds no support in the language of any portion of Act 30, particularly not in MCL 460.570(1), or in any case law.” *Har Co, LLC*, _ Mich App at _ (Slip Op at 10).

The Court of Appeals also rejected Oshtemo Township’s argument that Act 30 impermissibly delegates legislative power to the Commission. The Court of Appeals noted, “Act 30 is not an unconstitutional delegation of power. The evaluation of an application for a CPCN requires the PSC to consider a multitude of factors, including any conflicting local zoning ordinances.” *Id.* citing MCL 460.567(2)(d).

The Court of Appeals found that:

Each application presents its own unique facts and circumstances. The Legislature could not have specified with any practicality or feasibility what routes or configurations the PSC would be required to consider in each case. The standards set out in MCL 460.568(5) are as reasonably precise as the subject matter permits. See, e.g., *Kent Co. Aeronautics Bd. v. Dep’t of State Police*, 239 Mich.App. 563, 588, 609 N.W.2d 593 (2000). Moreover, the PSC can grant a CPCN only if it finds that the applicant has made the required showings set out in MCL 460.568(5). Neither Oshtemo Township nor amici Michigan Townships Association, et al, has established that Act 30 is an unconstitutional delegation of power from the Legislature to the PSC. [*Id.* at 11-12.]

Ultimately, the Court of Appeals found that “[t]he issues raised by appellants and amici in these consolidated cases are without merit and do not warrant reversal” *Id.* at 12. It is from this opinion Oshtemo Township appeals.

ARGUMENT

I. **Oshtemo Township has established none of the grounds an applicant must show to warrant this Court's review.**

Oshtemo Township has not established any of the grounds warranting this Court's review under MCR 7.302(B). Accordingly, this Court should deny the Township's application.

A. **Standard of Review**

In determining whether to grant an Application for Leave to Appeal, this Court applies the requirements of MCR 7.302(B). This Rule provides in relevant part:

(B) Grounds. The application must show that

- (1) the issue involves a substantial question as to the validity of a legislative act;
- (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
- (3) the issue involves legal principles of major significance to the state's jurisprudence;

* * *

- (5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

In other contexts, this Court has held that “[c]lear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made.” *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). Oshtemo Township has not made a meaningful effort to satisfy the criteria in MCR 7.302(B). For the reasons more fully discussed in the Argument sections, *infra*, the Township has failed to establish the necessary grounds for granting leave to appeal, and the Commission respectfully asks this Court to deny the Application.

B. Analysis

Oshtemo Township included the following conclusory statements in their statement of questions and in their argument headings—“which decision resulted in manifest injustice,” “thus resulting in manifest injustice,” and “the local control of public utilities authorized by the Michigan constitution being applicable to municipalities statewide and thus of statewide importance”—but did not follow up with any explanation or analysis. The Township has made no effort to satisfy the MCR 7.302(B) criteria beyond a few conclusory statements, and in fact, the Township does not even mention the grounds factors in the application. This Court has stated that it is the appellant’s duty to brief the issues it wants to raise and that failure to do so indicates that the Appellant has abandoned the issue:

It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow. Failure to brief a question on appeal is tantamount to abandoning it. [*Mitcham v*

City of Detroit, 355 Mich 182, 203; 94 NW2d 388 (1959) (internal citations omitted).]

1. Oshtemo Township has not shown that the Court of Appeals' decision involves a substantial question as to the validity of a legislative act.

The issue does not involve a substantial question as to the validity of a legislative act because, as discussed more fully *infra* in Section I.B.4, the Township's argument that the Certification Act impermissibly delegates legislative authority to the Commission is plainly without merit and therefore is not substantial. Nor is there any validity to the Township's argument that the Court of Appeals somehow "str[uck] down" the ordinance (Township Application p ii). In fact, the Court of Appeals noted that the Township's arguments "that Act 30 preempted Oshtemo Township's ordinance and is unconstitutional ignores the clear language of constitutional provisions, MCL 460.570(1), and binding precedent." *Har Co, LLC*, __ Mich App at __ (Slip op at 10). The Township's ill-conceived legal arguments cannot create a substantial question as to the validity of a legislative act.

2. The Township has not shown that the Court of Appeals' decision has significant public interest.

The Township has not alleged any public interest in this case. A number of affected landowners appealed the Commission's grant of the Certificate, but they have not sought leave from this Court to appeal the decision of the Court of Appeals. The Commission concedes that several amici (municipalities and associations representing municipalities) participated at the Court of Appeals level,

so there may be some municipal interest, but this alone, in the absence of the establishment of any of the other factors, is insufficient grounds to grant the application.

3. The Township has not shown that the Court of Appeals' decision involves legal principles of major significance to the state's jurisprudence.

This case does not involve legal principles of major significance to the state's jurisprudence. Outside of the Township's conclusory statement that because the challenged law applies to all municipalities it is of statewide importance, Oshtemo Township has made no attempt to establish this factor. The Court of Appeals did not make new law or espouse any novel interpretation of existing law. Rather, the Court of Appeals merely applied this state's constitution and laws as written, in conformance with the Court of Appeals' established precedent in *City of Lansing*, 275 Mich App at 433, and this Court's precedent set in *City of Taylor v Detroit Edison Co*, 475 Mich 109, 116; 715 NW2d 28 (2006).

4. The Township has shown neither that the Court of Appeals' decision is clearly erroneous nor that it will cause material injustice.

a. The Court of Appeals did not clearly err in finding the Electric Transmission Line Certification Act's mandate that a certificate of public necessity takes precedence over a conflicting ordinance does not constitute an unconstitutional usurpation of local authority.

As explained more fully above, Act 30 allows transmission companies to petition for a certificate of necessity for construction of transmission lines in

Michigan. At issue is the Commission's July 29, 2013 order granting METC a certificate under Act 30 to construct an overhead transmission line. Section 10 of Act 30 is unambiguous: "[i]f the commission grants a certificate under this act, that certificate shall take precedence over a conflicting local ordinance, law, rule, regulation, policy, or practice that prohibits or regulates the location or construction of a transmission line for which the commission has issued a certificate." MCL 460.570(1). In round-about fashion, the Township claims Act 30 violates Const 1963, Article 7, § 29, which provides that the use of highways and other public places by utilities must be subject to local approval:

No person, partnership, association or corporation, public or private, operating a public utility shall have the right to use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village, or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution, the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys, and public places is hereby reserved to such local units of government.

But the Township's argument fails as it ignores not only binding precedent but also other constitutional provisions which specifically make municipalities' powers to adopt zoning and other ordinances subject to Michigan law.

In *City of Taylor*, 475 Mich at 116, this Court explained that "the authority reserved to local units of government to exercise reasonable control over the enumerated subject areas is explicitly made subject to the other provisions of the Constitution." And it further provided that "[o]ne such [constitutional] provision is art. 7, § 22, which empowers cities and villages 'to adopt resolutions and ordinances

relating to its municipal concerns, property and government, subject to the constitution and law.” Id. (emphasis in original) citing Const 1963, art 7, § 22.

Thus it is clear that a municipality’s exercise of reasonable control over its highways and public places is expressly made subject to Article 7, § 22, which in turn expressly provides that a municipality’s power to adopt ordinances is subject to not just the state’s constitution, but also its *laws*. Const 1963, art 7, §§ 22, 29.

Thus, municipalities may “exercise ‘reasonable control’ to regulate matters of local concern, but only in a manner and to the degree that the regulation does not conflict with state law.” *City of Taylor*, 475 Mich at 117-118, citing *People v McGraw*, 184 Mich 233; 150 NW 836 (1915). For that reason, the Court found that the City of Taylor’s ordinance requiring the utility to bear the cost of relocating utility wires had to yield if it conflicted with the Commission’s rules on the subject. *City of Taylor*, 475 Mich at 120 (“if the portion of the ordinance that requires the utility to bear the entire cost of relocation conflicts with the MPSC rules on the subject, that portion of the ordinance is invalid.”).

Similarly, in *City of Lansing*, 275 Mich App at 429, 433, the Court of Appeals held that the Legislature has the authority to limit the manner and circumstances under which a city may grant or withhold consent under Article 7, § 29. The Court explained that although § 29 purports to grant municipalities the absolute authority to grant or withhold consent to a utility to use its highways, streets, alleys, or other public places for the placement of utility facilities, “our Supreme Court has stated that consent cannot be ‘refused arbitrarily and unreasonably’”

Id. at 432, citing *Union Twp v Mt Pleasant*, 381 Mich 82, 90; 158 NW2d 905 (1968). “Hence, the grant of authority is not absolute.” *Id.* The Court explained further that “[i]n order to give effect to [Article 7, § 29], a city must exercise its authority to grant or withhold consent through its general power to adopt resolutions and ordinances relating to its municipal concerns.” *City of Lansing*, 275 Mich App at 433. Like the *City of Taylor* Court, the *City of Lansing* Court also found that the constitutional provisions of Article 7, § 29 were bound by those of Article 7, § 22, granting municipalities the “power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law.” *City of Lansing*, 275 Mich App at 433. The Court reasoned:

Because a city’s general authority to adopt resolutions and ordinances is subject to the constitution and law, and a city’s authority to grant or withhold consent to use its highways, streets, alleys, and other public places can only be exercised through an ordinance or resolution, *it follows that a city’s ability to grant or withhold consent is also subject to the constitution and laws.* [*Id.* (emphasis added).]

Thus, municipalities’ constitutional authority to exercise reasonable control and to grant and withhold consent are both constrained by state law. “[A] municipality’s exercise of ‘reasonable control’ over its streets cannot impinge upon matters of statewide concern nor can a municipality regulate in a manner inconsistent with state law.” *City of Taylor*, 475 Mich at 112.

Viewed in the light of *City of Taylor* and *City of Lansing*, there can be no question that section 10 of Act 30 is constitutional.⁶ This provision merely provides

⁶ The Township’s reliance on the dissent of Justice Markman to this Court’s denial of the Application for Leave to Appeal the *City of Lansing* case is not in and of itself enough to make the Township’s case, as it is not precedential.

that, if the commission grants a certificate under Act 30, “that certificate shall take precedence over a conflicting local ordinance, law, rule, regulation, policy, or practice that prohibits or regulates the location or construction of a transmission line for which the commission has issued a certificate.” MCL 460.570(1). So, if the ordinance and the certificate conflict, the ordinance must cede to matters of statewide concern and state law, i.e., the certificate. The fact pattern in this case makes the analysis even more clear, as the Oshtemo ordinance at issue is a zoning ordinance. Oshtemo Township “Utility Control” Ordinance No. 525. Article 7, § 17 of Michigan’s Constitution provides: “[e]ach organized township shall be a body corporate with powers and immunities provided by law.” Indeed townships, unlike cities, “have no police power on their own, but only have those power and immunities which are provided by law.” *Detroit Edison Co v Richmond*, 150 Mich App 40, 47-48; 388 NW2d 296 (1986). In other words, local units of government have no inherent authority on their own to regulate zoning. The State must specifically grant them authority. *Lake Township v Sytsma*, 21 Mich App 210, 212; 175 NW2d 337 (1970). Municipalities derive their authority to enact zoning ordinances from the Zoning Enabling Act, MCL 125.3201, *et seq.*, which specifically provides that “(1) A zoning ordinance is subject to all of the following: (a) The electric transmission line certification act, 1995 PA 30, MCL 460.561 to 460.575 . . .” MCL 125.3205.

Act 30 merely parallels Michigan constitutional law: a local ordinance that conflicts with state law, here the certificate, simply must cede to state law. *City of*

Taylor, 475 Mich at 112. The Court of Appeals did not clearly err in affirming the Commission.

b. The Court of Appeals did not err in finding that the Certificate takes precedence over the conflicting ordinance.

The Township takes the untenable position in its question presented that the Court of Appeals erred by failing to determine if there was an actual conflict between the Certificate and the ordinance. Little investigation is required to determine that the Certificate provides for *aboveground* construction and the ordinance *belowground* construction. This is a conflict. In reality, the crux of the Township's argument is that the Commission should have been required to find a conflict between the ordinance and some state law other than the Certificate. But this position is not supported by the law, which states: "If the commission grants a certificate under this act, that certificate shall take precedence over a conflicting local ordinance" MCL 460.570(1). Thus, the conflict is between the Certificate and the ordinance—not the ordinance and some other state law. The Court of Appeals did not clearly err in finding the Certificate took precedence over the Township's ordinance, because the Township's arguments on this issue "finds no support in the language of any portion of Act 30, particularly not in MCL 460.570(1), or in any case law." *Har Co, LLC*, __ Mich App at __ (Slip op at 11).

c. The Court of Appeals did not clearly err in finding the Certificate Act does not improperly delegate power to the Commission.

The Township's improper delegation argument reflects a basic misunderstanding of the doctrine it cites. A simple statement of the nondelegation doctrine is found in *Field v Clark*, 143 US 649, 692; 12 S Ct 495; 36 L Ed 294 (1892), in which the United States Supreme Court explained that “the integrity and maintenance of the system of government ordained by the Constitution” precludes “Congress from delegating its legislative power to either the executive branch or the judicial branch,” as well as non-Michigan governmental agencies or to private individuals or associations. *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8; 658 NW2d 127, 131-32 (2003) citing *Field*, 143 US 692; see also *Coffman v State Bd of Examiners in Optometry*, 331 Mich at 587-588. This concept has its roots in the separation of powers principle underlying our tripartite system of government. *Smithkline*, 468 Mich at 8. “In the federal courts these improper delegation challenges to the power of federal regulatory agencies have been uniformly unsuccessful since the advent of large regulatory agencies in the 1930s.” *Id* at 9. The Michigan Supreme Court has considered similar claims regarding statutes where the claims included an allegation of improperly delegating the Legislature's power to a Michigan agency, and it has rejected the claims on a basis similar to the federally developed rationale. *Id.* at 10. As the Michigan Supreme Court explained in *People v Turmon*, 417 Mich 638, 649-50; 340 NW2d 620 (1983):

[T]he complexities of modern government necessitate that today many facets of traditionally “legislative” power be exercised by administrative agencies. Provided that sufficient standards and

safeguards, as discussed above, are provided to circumscribe the agencies' use of legislative power, thereby insuring effectuation of legislatively declared policies and a means to "check" agency action, such delegation of legislative power has been sanctioned repeatedly by this and other courts. [(Internal citation omitted).]

Apparently, the complexities of non-modern government require this same conclusion. The *Smithkline* Court quoted from the *Appeal of Locke*, 72 Pa 491, 498-499 (1873): "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government." *Smithkline*, 468 Mich at 9 n 7.

The Township erroneously relies on *Blue Cross & Blue Shield of Michigan v Milliken*, 422 Mich 1; 367 NW2d 1 (1985) for its proposition that the Certification Act improperly delegates power to the Commission. The *Milliken* Court analyzed Blue Cross's claim that Nonprofit Health Care Corporation Reform Act's delegation of the resolution of risk-factor disputes to a panel of three actuaries was an unconstitutional delegation of legislative authority. The *Milliken* Court set forth the standard for review of nondelegation challenges:

1) the act must be read as a whole; 2) the act carries a presumption of constitutionality; and 3) the standards must be as reasonably precise as the subject matter requires or permits. The preciseness required of the standards will depend on the complexity of the subject. Additionally, due process requirements must be satisfied for the statute to pass constitutional muster. Using these guidelines, the Court evaluates the statute's safeguards to insure against excessive delegation and misuse of delegated power. [*Id.* at 51-52.]

The challenged act provided that once a healthcare company assigned a risk factor, the Insurance Commissioner must either approve or disapprove the factors

proposed by the corporation. *Id.* at 52 citing 1980 PA 350 § 205(13)(c). “No guidelines are provided to direct the Insurance Commissioner’s response.” *Id.* Next, if the risk factors are disapproved, a panel of three actuaries “shall determine a risk factor for each line of business”; “no further directions are set forth to guide the panel.” *Id.* at 53 citing 1980 PA 350 § 205(6). The *Milliken* Court found the complete “lack of standards defining and directing the Insurance Commissioner’s and the actuary panel’s authority renders this dispute resolution mechanism constitutionally defective.” *Id.* at 55.

Unlike the statute at issue in *Milliken*, the Certification Act specifically defined the scope and nature of the Commission’s review, and set standards directing Commission’s authority. Act 30 § 8(5) provides that the Commission *must* grant an application for a certificate if it determines all of the following:

- (a) The quantifiable and nonquantifiable public benefits of the proposed major transmission line justify its construction.
- (b) The proposed or alternative route is feasible and reasonable.
- (c) The proposed major transmission line does not present an unreasonable threat to public health or safety.
- (d) The applicant has accepted the conditions contained in a conditional grant. [MCL 460.568(5).]

Furthermore, the Certification Act also specifically provided due process protections as it requires notice to landowners and municipalities, conduct of a contested case, automatic intervention by affected landowners and municipalities, and direct appeal of the Commission’s order to the Court of Appeals. MCL 460.568; MCL 460.575. This is a far cry from the complete lack of standards in *Milliken*.

The Township shows its misunderstanding of the doctrine when it complains that the Certificate Act gives total discretion to the MPSC to “strike down any other Ordinance or regulation no matter how reasonable it was” (Township’s Application at 12). But, as so eloquently put in *Locke* more than a century ago, the Legislature “can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government.” *Smithkline*, 468 Mich at 9 n 7 citing *Locke*, 72 Pa at 498-99. The Legislature made the law: a Certificate takes precedence over local ordinances that conflict with the Certificate. The Legislature also made its own action (preempting local ordinances) depend upon the Commission’s determination of a “fact or state of things”—the Commission’s determination to grant a Certificate pursuant to the standards of §8(5) of Act 30. Or, put another way, “[a] delegation of legislative power does not occur when a statute merely provides that specific legal consequences under Michigan law will result from an act or determination by a federal agency of a fact that has independent significance.” *Smithkline*, 468 Mich at 4. The Legislature did not improperly delegate legislative authority to the Commission, and the Court of Appeals did not clearly err in so finding.

d. The Court of Appeals did not clearly err by not considering definition sections never raised by the Township.

i. The Township has not preserved this issue.

The Township claims the Court of Appeals erred in not applying the definitions of the terms “route” and “construction” found in the Certification Act in analyzing whether there was a conflict between the Certificate and the ordinance. However, the Township never raised this issue in the Court of Appeals. As such, the Township has not preserved the issue for review in this Court.

ii. The definitions sections identified by the Township are either inapplicable or would not change the outcome.

Even if the Township had properly preserved the definitions issue, it is nevertheless unavailing. The Township correctly notes that in construing a statute, the courts should consider the entire statute, including definitions. However, for such consideration to be germane, the definitions must be applicable. The Township quotes MCL 460.570(1), which states that:

If the commission grants a certificate under this act, that certificate shall take precedence over a conflicting local ordinance, law, rule, regulation, policy, or practice that prohibits or regulates the *location* or *construction* of a transmission line for which the commission has issued a certificate.

The Township inexplicably argues the Court of Appeals should have considered the definition of the word “route” contained in MCL 460.562(I). The word “route” is not the same as the word “location.” MCL 460.562 contains no definition of the word “location.”

The Township also argues the Court of Appeals should have considered the definition of the word “construction” in MCL 460.562 (d), which provides:

(d) “Construction” means any substantial action taken on a route constituting placement or erection of the foundations or structures supporting a transmission line. Construction does not include preconstruction activity or the addition of circuits to an existing transmission line.

There can be no creditable argument that the zoning ordinance does not regulate or prohibit construction. In order to place transmission lines above ground, erection of foundations and structures supporting the transmission line is required.

Transmission lines do not float on air, but require construction of supporting structures. The zoning ordinance requires burying transmission lines, which regulates the manner of constructing the line, i.e. without construct of supporting structures.

The Township’s arguments regarding the definitions contained in the Certification Act are not only unpreserved, but also entirely specious.

CONCLUSION AND RELIEF REQUESTED

Oshtemo Township has failed to meet its burden under MCR 7.302(B) to establish grounds upon which this Court could grant the application. In fact, the Township made little or no effort to establish such grounds. Furthermore, the legal positions taken by the Township in the Application lack merit. The Certification Act is a constitutional exercise of legislative authority that limits the ability of a municipality to unreasonably withhold consent for, or impose conditions on, transmission projects of statewide concern. Moreover, the legislature placed appropriate standards governing the Commission's approval of a Certificate, narrowly constraining the discretion of the Commission, in a proper delegation of legislative authority. The Certificate requiring aboveground construction of the transmission line takes precedence over the conflicting zoning ordinance requiring belowground construction, as is proper when local ordinances conflict with state law and statewide concerns.

The Commission requests this honorable Court deny the Township's application for leave to appeal the Court of Appeals' opinion affirming the Commission's grant of a certificate of public convenience and necessity to METC under Act 30.

Respectfully submitted,

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